No. 14-990

In the

# Supreme Court of the United States

STEPHEN M. SHAPIRO, ET AL.,

PETITIONERS,

v.

DAVID J. MCMANUS, JR., CHAIRMAN, MARYLAND STATE BOARD OF ELECTIONS, ET AL.,

RESPONDENTS.

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF *AMICI CURIAE* PROFESSORS JOSHUA A. DOUGLAS AND MICHAEL E. SOLIMINE, ELECTION LAW SCHOLARS, IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

Professor Joshua A. Douglas and Professor Michael E. Solimine are election law experts who have a particular interest in the procedural aspects of election litigation.

Professor Douglas is the Robert G. Lawson & William H. Fortune Associate Professor of Law at the University of Kentucky College of Law. He teaches courses in Election Law, Civil Procedure, Constitutional Law, and Supreme Court Decision Making. He is the co-author of an election law case book and has written numerous articles on the topic, including several regarding the procedural aspects of election law cases.

Professor Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches Election Law, Civil Procedure, Complex Litigation, and Federal Courts. He is also a co-author of an election law case book and has written scores of articles, including several specifically about the three-judge district court process.

Professors Douglas and Solimine are filing this brief because they have a keen interest in ensuring that the federal courts employ the proper procedure

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[1] Petitioners and respondents have filed blanket consent letters with the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

in election law cases, as doing so helps to resolve these disputes in a manner that best comports with the unique aspects of the electoral system. This brief explains why district courts should not use the pleading standard from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in making the threshold determination whether to refer a redistricting case to a three-judge district court. Relying on Professor Douglas's and Professor Solimine's experience and expertise in this area, it describes the history of the three-judge district court and explains the strong legal and policy reasons why Congress intended for three-judge district courts to resolve redistricting cases. The single district judge here improperly dismissed this case without referring it to a three-judge district court.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about election law procedure. Although seemingly arcane, the question presented is vitally important to the proper handling and resolution of election disputes in federal court. If this Court does not correct the district court's decision, it would set a dangerous precedent that would have significant negative consequences for the proper functioning of the electoral system.

There are two primary reasons to reject the single district judge's refusal to refer this case to a three-judge court.

First, the district court failed to follow this Court's precedent when it construed the sufficiency of the plaintiffs' complaint under the *Twombly* and *Iqbal* pleading standard instead of determining whether the plaintiffs' claims were "obviously frivolous." The single district judge believed that the plaintiffs' legal contention of partisan gerrymandering failed the plausibility standard of *Twombly* and *Iqbal*; but those cases apply to a complaint's factual allegations, not to its legal contentions. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This Court said so explicitly (and unanimously) in *Johnson v. City of Shelby*, holding that a district court may not dismiss a complaint for an "imperfect statement of the legal theory supporting the claim asserted." 135 S. Ct. 346, 346 (2014) (per curiam). Instead of invoking *Twombly* and *Iqbal*, the single district judge was required to determine whether the plaintiffs' claims were "obviously frivolous." *Goosby*

*v. Osser*, 409 U.S. 512, 518 (1973). Because asserting unlawful partisan gerrymandering under the First Amendment is not obviously frivolous under this Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the district judge should have referred the matter to a three-judge court.

Second, the single district judge's failure to comply with precedent is inconsistent with the policies that Congress sought to implement when enacting the Three-Judge Court Act. Although Congress restricted the jurisdiction of three-judge district courts in certain areas, it explicitly retained it for redistricting cases given the importance of the disputes, the particular concern for timeliness, and the desire to create a tribunal that can render decisions seen as legitimate and devoid of ideological taint. Refusing to refer these cases to three-judge courts, and instead allowing a single judge to decide the merits, will thwart these important policy goals.

The district court went beyond its authority in dismissing this case on the merits. This Court should reverse the Fourth Circuit's affirmance of the district court's decision as contrary to both precedent and the historical and policy goals of the Three-Judge Court Act. Doing so will help to streamline the resolution of redistricting disputes.

## ARGUMENT

### I. The Single District Court Judge Erred In Failing To Refer This Redistricting Dispute To A Three-Judge District Court.

The single district court judge in this case improperly applied the *Twombly/Iqbal* pleading

standard and erroneously found that the plaintiffs' complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). Instead, the district judge should have determined whether plaintiffs' claims were "obviously frivolous." If the district court had applied the correct standard, it would have denied the motion to dismiss and referred the case to a three-judge district court.

### A. A District Court Judge May Refuse To Refer a Qualifying Case To A Three-Judge Court Only If The Claim Is "Obviously Frivolous."

The Three-Judge Court Act provides that "[a] district court of three judges shall be convened when an action is filed challenging the constitutionality of the apportionment of congressional districts " 28 U.S.C. § 2284(a). This Court has recognized only limited exceptions to that mandate. In *Goosby v. Osser*, this Court unanimously held that a single district judge to which the case is initially assigned may refuse to convene a three-judge district court only when the claim is "wholly insubstantial," which the Court equated with being "obviously frivolous." 409 U.S. 512, 518 (1973).

The term "obviously frivolous" has special meaning in the context of the Three-Judge Court Act. This Court has explained generally that a legal claim is "frivolous" where "[none] of the legal points [are] arguable on their merits." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). A complaint is "frivolous" only "where it lacks an arguable basis either in law

or in fact." *Ibid.* In the context of the Three-Judge Court Act, an even higher bar applies for dismissing a case before referring it to a three-judge panel. As this Court has explained, the complaint must not only be frivolous, but "wholly insubstantial" and "obviously frivolous." *Goosby*, 409 U.S. at 518. "The limiting words 'wholly' and 'obviously' have cogent legal significance." *Ibid.* The words "import that claims are constitutionally insubstantial only if the prior decisions *inescapably* render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes' of the Three-Judge Court Act. *Ibid.* (emphasis added).

The "obviously frivolous" standard sets a low bar because, as this Court explained long ago, the determination as to whether to convene a three-judge district court serves the principal purpose of ensuring that the panel has subject-matter jurisdiction. *See Ex parte Poresky*, 290 U.S. 30, 32 (1933) (per curiam) (explaining that "the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears"); *see also Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 13, 18 (1930) (holding that a single judge may dismiss a case that warrants a three-judge district court only for lack of jurisdiction). Accordingly, a single judge is not "authorized" to dismiss a case on the merits, no matter what "his opinion of the merits might be." *Ex parte Poresky*, 290 U.S. at 31; *see also Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962) (per curiam) (a single judge may not "decide the merits").

### B. The District Court Judge Improperly Invoked The *Twombly/Iqbal* Pleading Standard.

The district court failed to apply the "obviously frivolous" standard because it wrongly imported the pleading rules from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to determine whether to refer this case to a three-judge district court. *Twombly* and *Iqbal*, however, do not apply to the question of whether a claim is "obviously frivolous," "wholly insubstantial," or lacking federal court jurisdiction, which are the only bases to deny convening a three-judge district court. *See Goosby*, 409 U.S. at 518. Moreover, *Twombly* and *Iqbal* require courts to consider the factual plausibility of a plaintiff's complaint, not the legal sufficiency of the plaintiff's arguments. But the district court here did not hold that the plaintiffs' *facts* were insufficient. It stated, instead, that it believed the plaintiffs' *legal arguments* were unmeritorious. *Twombly* and *Iqbal* provide a poor framework for testing the legal sufficiency of a redistricting claim.

In *Twombly*, this Court held that, in deciding a motion to dismiss under Rule 12(b)(6), a court should consider whether the complaint includes facts that render the asserted claim "plausible." 550 U.S. at 557. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. Only "factually suggestive" complaints are sufficient. *Id.* at 557 n.5. Two years later, this Court in *Iqbal* reaffirmed that a complaint may not simply assert conclusory statements and instead must present

well-pleaded factual allegations that "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

Importantly, in neither of these cases did the Court hold that a plaintiff's *legal* contentions must meet the plausibility standard. To the contrary, just last year this Court held unanimously that *Twombly* and *Iqbal* do not apply to a plaintiff's legal assertions. *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (per curiam). In *Johnson*, this Court, in summarily reversing a lower court's dismissal under Rule 12(b)(6), explained that *Twombly* and *Iqbal* "concern the *factual* allegations a complaint must contain to survive a motion to dismiss." *Id.* at 347 (emphasis added). "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.* at 346 (citing FED. R. CIV. P 8(a)).

*Johnson*'s logic applies with particular force in the election law context. Election law cases, including redistricting disputes, are typically poor vehicles for applying the *Twombly/Iqbal* standard. The facts are often not in dispute and the ultimate question is the legal implications of the undisputed facts. *See* Joshua A. Douglas, *Election Law Pleading*, 81 GEO. WASH. L. REV. 1966, 1986 (2013) ("*Twombly* and *Iqbal* therefore do not help much in the redistricting context: there is little need for a 'factual plausibility' showing when a plaintiff already knows all of the facts to state a claim but must establish that those facts will lead to legal liability.").

The district court here dismissed the plaintiffs' First Amendment claim not because of a failure to present sufficient factual content but because of a perceived deficiency in the legal argument regarding whether the First Amendment can support their claim for unlawful partisan gerrymandering. No one disputes that the plaintiffs have presented sufficient facts regarding Maryland's redistricting. The question is the legal implication of those facts. The single district court judge thus erred in refusing to convene a three-judge district court based on a disagreement with the plaintiffs' legal theory.

### C. The Plaintiffs' Claims Are Not Obviously Frivolous.

To dismiss this case without convening a three-judge district court, the single district judge would have had to conclude that the plaintiffs' suit is so insubstantial and frivolous that there can be no doubt that precedent would completely foreclose their claims. *See Goosby*, 409 U.S. at 518. The district judge here did not—and under this Court's precedent could not—reach that conclusion.

The plaintiffs base their claim for partisan gerrymandering on the First Amendment. They assert that Maryland's redistricting plan burdens their First Amendment rights of political association by gerrymandering congressional districts along political lines. Regardless of the ultimate merits of the claim, this Court has explicitly left the door open to this argument. Refusing even to allow a three-judge district court to consider the claim is contrary to this Court's invitation—per Justice Kennedy's concurrence in *Vieth v. Jubelirer*, 541 U.S. 267, 306–

18 (2004)—for litigants to suggest judicially manageable standards in this area.

In *Vieth*, four Justices found claims of partisan gerrymandering nonjusticiable, four Justices offered a variety of standards, and Justice Kennedy, whose opinion was the narrowest ground for decision, stated that he would "not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306 (Kennedy, J., concurring in the judgment). As Justice Kennedy noted, "[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future." *Id.* at 311. He also pointed explicitly to the First Amendment as a likely source of a judicially manageable standard: "The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering." *Id.* at 314.

The district court was therefore incorrect in construing *Vieth* as "holding" that claims of partisan gerrymandering are nonjusticiable and thereby rendering the plaintiffs' claim frivolous or wholly insubstantial. *See* Pet. App. 17a–20a. There were only four votes in *Vieth* for holding all future partisan gerrymandering claims nonjusticiable. Because of Justice Kennedy's narrower conclusion, plaintiffs are free to offer judicially manageable standards that might convince the Court that there is a path to judicial oversight of partisan gerrymandering. Justice Kennedy's separate opinion in essence invites

future litigants to consider the First Amendment as a possible source of a judicially manageable standard.

That is exactly what the plaintiffs did here. Refusing them the opportunity to present the argument to a three-judge district court would thwart the potential of a judicially manageable standard ever emerging. Under the district court's ruling, no single judge would ever send a claim for partisan gerrymandering to a three-judge district court because of the mere possibility that these claims are always nonjusticiable under *Vieth*. This would present a tangible harm to redistricting litigation and to any future effort to locate a judicially manageable standard. Moreover, as this Court stated in *Goosby*, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes' of whether to convene a three-judge district court. *Goosby*, 409 U.S. at 518. Even if the plaintiffs' legal argument is doubtful under *Vieth*, the district court should still have convened a three-judge tribunal to consider the merits.

Under the Three-Judge Court Act, it is not up to a single judge to decide whether a plaintiff's legal claims have merit. The district court's overreach in deciding the merits of this dispute requires reversal and the convening of a three-judge court.

## II. The District Court Judge's Failure To Refer This Case To A Three-Judge Court Is Contrary To Congressional Intent And Raises Significant Policy Concerns.

The permissive "obviously frivolous" standard under the Three-Judge Court Act is rooted in compelling policy considerations that favor having redistricting cases decided by three judges at the district court level. The district judge's decision in this case contravenes Congress's careful policy judgments.

### A. The "Obviously Frivolous" Standard Is Tied To Congressional Intent And The History Of The Three-Judge Court Act.

Congress created the three-judge district court as a reaction to *Ex parte Young*, 209 U.S. 123 (1908), which held that state officials could be sued in federal court for enforcing allegedly unconstitutional state laws, notwithstanding that the state itself could not be named in the suit as a result of the Eleventh Amendment. The decision aroused great controversy, as it permitted constitutional attacks to be launched in federal court against Progressive Era legislation, as opposed to raising those issues as defenses to enforcement actions in state court. So controversial was the decision that proposed legislation sought to strip federal courts of their jurisdiction to hear such actions. But those proposed bills never became law and, in 1910, Congress settled on a "less drastic remedy." 17A Charles Alan Wright, et al., Federal Practice and Procedure § 4234 (3d ed. 2007).

The remedy consisted of requiring "the convening of extraordinary trial courts composed of three judges in certain kinds of cases," with a direct appeal available to this Court. *See generally* David P Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 2 (1964). The court consisted of the district judge before whom the case was originally assigned, plus a circuit judge and another judge (typically another district judge) who the Chief Judge of the circuit would select.

There were several, interrelated reasons Congress created this unique procedure for *Ex parte Young*-type actions. It was thought that such actions were important and complicated, and that they raised unique federalism concerns, so that the consideration of injunctive relief should not be in the purview of a single district judge. The presumably greater faculties and deliberation of three minds should be brought collectively to bear on the question. Congress also believed that there would be greater public acceptance of the decision if three federal judges rendered it rather than just one. And the provision for a direct appeal would allow for speedy resolution of the matter by this Court. 17A Federal Practice and Procedure § 4234; Currie, 32 U. CHI. L. REV. at 5–7; Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 458–63. Congress thought enough of the virtues of a three-judge district court that, in succeeding decades, it expanded the court's jurisdiction to encompass other weighty and controversial matters, including constitutional challenges to federal statutes (in 1937) and

declaratory judgments under the preclearance provisions of the Voting Rights Act (in 1965).

Although some critics of three-judge courts suggested that they unnecessarily burdened the federal judiciary, *see Ex parte Collins*, 277 U.S. 565, 567–69 (1928) (Brandeis, J.), Congress has seen the need to retain them for certain important cases such as redistricting disputes. In the early and mid-1900s, the concern with administrative burdens—on lower court judges in convening a three-judge panel for trial court litigation, and on this Court in disposing of mandatory direct appeals—became more pronounced as the number of such cases increased. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J. L. REF. 79, 137–38 tbls. 1–2 (1996) (showing large numbers of three-judge court cases in district courts, and decided on direct appeal in this Court, in the 1960s and 1970s). As a result, many critics, in academia, among judges, and in the practicing bar, called for the abolition of the three-judge court, or at least the significant curtailment of its jurisdiction. For example, in a leading article, Professor David Currie argued that "consuming the energies of three judges to conduct one trial is prima facie an egregious waste of resources" and that the numerous direct appeals from these courts were an unnecessary exception to this Court's discretionary jurisdiction. Currie, 32 U. CHI. L. REV. at 2, 74.

Yet crucially, many authorities also argued that Congress should leave the three-judge district court intact for certain narrow categories of cases. Professor Currie suggested, for instance, that the

benefits of the court might still be appropriate for "[r]ace-relations and reapportionment cases, [which] have caused a good deal of friction between the states and the courts." *Id.* at 75. In its Study of the Division Between Federal and State Courts, the American Law Institute argued that the "image of the federal courts as a barrier against liberal state legislation [had] long since disappeared," but that "other controversies" had arisen that had led to "strained relations" between federal courts and the states. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, 48–56, 319 (1969). The Study referred explicitly to cases arising under the Equal Protection Clause, including reapportionment disputes. *Id.* at 319–21.

These arguments informed Congress's reappraisal of the three-judge district court in the 1970s. The Judiciary Committees held extensive hearings on the topic in the first half of that decade, with many prominent judges, lawyers, and academics testifying both in support of and against limiting the jurisdiction of the three-judge court. *See* Michael E. Solimine, *Congress,* Ex parte Young, *and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 141–44 (2008). To give one illustrative example, U.S. Court of Appeals judges Henry Friendly and J. Skelly Wright both testified in support of curtailing the court's jurisdiction in general but maintaining it for reapportionment cases in light of what they considered the "public importance" and the need for "public acceptance" of those decisions. *Id.* at 142.

This legislative consideration culminated in the 1976 Amendment, which abolished the court *except* for reapportionment cases and certain other cases that Congress explicitly designated. *See* Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284(a)). The House and Senate Judiciary Committee reports acknowledged the administrative concerns critics had raised, but the reports determined that the "importance" of redistricting cases warranted retaining the three-judge district court for these disputes. S. Rep. No. 94-204, at 9 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1991; H.R. Rep. No. 94-1379, at 4 (1976). 17A Federal Practice and Procedure § 4235.[2] Congress's decision to keep the three-judge court for redistricting cases was thus a carefully considered choice. That choice would be undermined if a single district court judge could dispose of a redistricting case on the merits without the benefits of referring the case to a three-judge panel.

### B. Strong Policy Reasons Counsel In Favor Of Having Three-Judge Courts Decide Redistricting Cases.

Redistricting cases are not ordinary civil disputes with typical pleading rules. They are a

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[2] The 1976 Amendment did not purport to curtail certain specialized three-judge district courts found in other legislation. This included the preclearance provisions of Section 5 of the Voting Rights Act of 1965 and certain other provisions of the Civil Rights Act of 1964.

special category of cases in which historical and contemporary practice demonstrates the wisdom of having three-judge district courts decide these cases.

The virtues of the three-judge district court process are particularly pronounced in redistricting cases. As compared to the typical three-tiered approach to federal court decision making, the three-judge court procedure, with direct appeal to this Court, usually produces faster decisions in an area in which quick resolution is needed so states may implement their new legislative maps for the next election. Moreover, both the litigants and the public may view a redistricting decision by a three-judge court as more accurate or legitimate because three judges—including one appellate judge—have come together to resolve the dispute. Similarly, having multiple judges decide a case that involves political issues can reduce the appearance or reality of ideology influencing the decision. *See* Douglas, 2011 UTAH L. REV. at 458–63 (highlighting timeliness, accuracy, mitigation of ideology, and legitimacy as virtues of the three-judge district court procedure for election law cases).

In addition, modern redistricting litigation often involves the use of sophisticated quantitative evidence and expert testimony. *See* D. James Greiner, *The Quantitative Empirics of Redistricting Litigation: Knowledge, Threats to Knowledge, and the Need for Less Districting*, 29 YALE L. & POL'Y REV. 527 (2011). There are thus benefits in having three minds, rather than just one, available to consider and analyze this evidence. Indeed, experience with the three-judge district court has shown that the

threshold issues that single judges sometimes consider "are not invariably easy ones" and are often better suited for the full three-judge panel. Currie, 32 U. CHI. L. REV. at 23.[3]

It is also not surprising that, given the controversial and contested nature of most redistricting cases, three-judge district courts have a much higher rate of dissent than the typical three-judge panel on the U.S. Courts of Appeals. *See* Solimine, 30 U. MICH. J. L. REF. at 139 tbl. 4 (noting that in 89 three-judge district court cases from 1976 to 1994, there was a dissent in 22 of them). Indeed, both of the three-judge district court cases that this Court reviewed last Term were 2-1 decisions. *See Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013) (three-judge court), *vacated*, 135 S. Ct. 1257 (2015); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014) (three-judge court), *aff'd*, 135 S. Ct. 2652 (2015). Likewise, there is a much higher rate of appeal to this Court from three-judge district court decisions, as compared to the typical rate of appeal from decisions of a single district judge to the U.S. Court of Appeals. Solimine, 30 U. MICH. J. L. REF. at

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[3] David P. Currie, the distinguished analyst of the history and practice of the three-judge district court, wondered on this point, in a prescient way for the present case, whether a "single judge [should] have dismissed the suit to reapportion Tennessee's legislature on the basis of *Colegrove v Green*?" 32 U. CHI. L. REV. at 23 (footnote omitted). He was referring to *Baker v. Carr*, 369 U.S. 186 (1962), in which a three-judge district court was convened. 175 F. Supp. 649, 652 (M.D. Tenn. 1959).

99 (noting that up to 40 percent of three-judge district court decisions since 1976 have been appealed to this Court). These facts demonstrate the importance of a sustained three-judge court process.

Convening three-judge district courts in redistricting cases is also necessary to ensure that the law continues to develop. If plaintiffs could reach the three-judge court only by surviving a Rule 12(b)(6) motion to dismiss, plaintiffs would fear immediate dismissal when presenting a novel legal argument or a plea to overrule prior precedent. *Cf.* FED. R. CIV. P 11(b)(2) (noting that a lawyer may not be sanctioned for presenting a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). The purpose of the Three-Judge Court Act, however, was exactly the opposite—to ensure that the specific issues Congress identified as particularly important would receive full consideration by multiple judges. *See* S. Rep. No. 94-204, at 4, 9, *reprinted in* 1976 U.S.C.C.A.N. at 1991, 1996 (explaining that redistricting cases are "of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases"); *see also* Currie, 32 U. CHI. L. REV. at 24 (highlighting the Court's historical distinction in the three-judge court context between dismissals for lack of jurisdiction, which a single judge may issue, and dismissals on the merits, which are reserved for the three-judge tribunal).

These advantages would largely disappear if a single judge had broad authority to dismiss a case on non-jurisdictional, merits-based grounds without

allowing a three-judge district court to decide the dispute. A case would take longer as it wades through the normal appellate process in determining if the claim is actually frivolous, putting off a decision on the merits as the election clock continues to tick. The resulting lengthy process could also compromise accuracy and legitimacy in the very area in which Congress believed three judges were better than one. And the process would lose the benefits of different viewpoints mitigating the fear of ideology in a case involving politics.

Congress purposefully retained three-judge courts for redistricting cases to adhere to these policy goals. Allowing a single judge to dismiss a case on the merits without convening a three-judge court would undermine Congress's well-considered choice.

### C. The District Court Judge's Approach Raises Broader Policy Concerns.

If the district court's holding had been in effect in other circuits, many important election law cases likely would have never reached this Court—or at least would have taken much longer to make their way through the U.S. Court of Appeals process, hampering states' ability to administer their upcoming elections. In addition to the two redistricting cases deriving from three-judge district courts that this Court considered in the previous Term, *see Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015), other significant redistricting cases might never have received the needed clarification that this Court provided. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934

(2012) (per curiam); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (Mem) (2004).[4] The Court also would likely not have had the same opportunity to resolve the important one person, one vote issue in *Evenwel v. Abbott*, 135 S. Ct. 2349 (Mem) (2015), this Term. If a single district judge can dismiss claims on the merits without referring them to a three-judge district court, then these cases, many of which asked the Court to overturn prior precedent, might have suffered premature dismissal without full vetting by a three-judge court, with direct appeal to this Court.

The consequences of the lower court's holding in this case are stark. Under the district court's view, a single district judge will be able to resolve the merits of a redistricting case without the benefit of convening a three-judge district court. A plaintiff can appeal that decision to the circuit court, and seek this Court's review via a writ of certiorari, but that path is fundamentally different from having the merits reviewed by a three-judge district court as an initial matter. Although a Rule 12(b)(6) motion to dismiss is entirely appropriate, and should be granted if warranted, in a redistricting case, *e.g.*, *Ariz. State Legislature*, 997 F. Supp. 2d at 1048, the appropriate

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[4] There are similar concerns for other election law cases that use the three-judge district court process, such as campaign finance or Voting Rights Act litigation. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

tribunal to consider such a motion is a three-judge district court.

## CONCLUSION

This Court should reverse the Fourth Circuit's decision and remand the case for consideration by a three-judge district court.

Respectfully submitted,

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